



For attention: Mr Nelson Matibe ; Dr Jacob Buti Skosana; Mr Fanyana Mdumbe

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31 March 2026

Dear Dr Skosana and Mr Mdumbe

The Helen Suzman Foundation is an NGO that advocates for constitutional democracy and human rights in South Africa. We attach our written submission in response to the invitation for comments on the [Discussion Paper 16g: Mental and Intellectual Disability and the Criminal Justice System](#).

Should you have any queries, it would be appreciated if you could contact me at the following email address: [naseema@hsf.org.za](mailto:naseema@hsf.org.za)

Yours Sincerely

A handwritten signature in black ink, appearing to read 'Naseema Fakir', with a horizontal line extending to the right.

Naseema Fakir  
Executive Director  
Helen Suzman Foundation

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## 1. Introduction

- 1.1. The effective treatment of persons with mental and intellectual disabilities within the criminal justice system raises complex legal, institutional, and human rights considerations. It requires a careful balancing of the rights of accused persons, the interests of victims, and the broader objectives of justice, accountability, and public safety.
- 1.2. The Helen Suzman Foundation (“HSF”) welcomes the South African Law Reform Commission’s (“SALRC”) five discussion papers on the review of the Criminal Procedure Act, 1977.<sup>1</sup>
- 1.3. However, HSF submits that the discussion paper would benefit from greater reliance on empirical data and broader engagement with stakeholders across the criminal justice and mental health sectors. Without a clearer understanding of the practical operation of the system, it is difficult to assess whether the proposed reforms will adequately address existing challenges.
- 1.4. In addition, HSF is concerned that the discussion papers currently under consideration do not sufficiently address the position of victims of crimes committed by individuals who are subsequently declared State Patients. While significant attention is devoted to the rights of accused persons, the post-trial experiences and interests of victims appear to remain largely unaddressed.
- 1.5. HSF therefore submits that the reform process would be strengthened by:
  - 1.5.1. Systematic collection of empirical data across the criminal justice and mental health sectors, and
  - 1.5.2. Greater consideration of the role and interests of victims within processes relating to the detention, review, and release of State Patients.

## 2. Lack of Reliable Empirical Data

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<sup>1</sup> Last year HSF commented on two discussion papers issued by the SALRC, namely: 1) *Lawyers for Human Rights and Helen Suzman Foundation submission to the SALRC on Discussion Paper 167 – Review of the Criminal Justice System: Review of South Africa’s Bail System* (14 May 2025). Available here: <https://hsf.org.za/publications/submissions/lhr-hsf-salrc-submission-bail-reform.pdf>; 2) *Written submission in response to the invitation for comments on the Discussion Paper 165, Project 151: Review of the Criminal Justice System: Alternative Dispute Resolution and Non-Prosecution* (31 March 2025). Available here: <https://hsf.org.za/publications/submissions/helen-suzman-foundation-submission-discussion-paper-165-on-non-trial-resolutions-31-march-2025.pdf>.

- 2.1. The HSF welcomes the focus of this discussion paper but submits that it could be strengthened through the inclusion of additional data and analysis. Such information would not only assist in informing statutory reform but would also support broader policy reform within the criminal justice system in relation to persons with mental and intellectual disabilities.
- 2.2. Paragraph 10 of the Executive Summary acknowledges the lack of available data but does not propose recommendations on how this gap might be addressed or outline practical steps for collecting the necessary information. The relevant section reads as follows:<sup>2</sup>

*"Lastly, it is prudent to point out that there is paucity of information relating to the representation of (the number of people), and outcomes for, people with cognitive and mental health impairments in the criminal justice system. For example, neither the South African Police Service nor the Department of Correctional Services annual reports contain relevant information and statistics in this regard. To distil this and other data crucial to our understanding of the issues, so as to be able to fashion recommendations that improve the laws in this regard, we ask pertinent questions throughout this discussion."*

- 2.3. In the absence of reliable data, it is extremely difficult to understand the criminal justice system value chain in relation to accused persons, witnesses, and victims with mental or intellectual disabilities. A reading of the discussion paper suggests that disaggregated statistics are currently unavailable in respect of several critical areas, including:

- 2.3.1. The number of persons affected (accused, witnesses, or victims);

- 2.3.2. The number of hospital beds available in mental health care facilities for psychiatric observation and treatment pursuant to court orders once a person has been found unfit to stand trial;

- 2.3.3. The distribution of these facilities across the country;

- 2.3.4. The number of psychiatrists available to conduct court-ordered psychiatric observations, as well as their distribution across the country;

- 2.3.5. The average time spent in remand detention while awaiting psychiatric observation for possible declaration as a State Patient;

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<sup>2</sup> Page VIII.

- 2.3.6. The time required to complete psychiatric assessments and reports, as well as the time taken to provide the report to prosecutors and courts;
  - 2.3.7. The average length of time spent as State Patients before release by a Review Board;
  - 2.3.8. The total number of State Patients at any given time, disaggregated by location and offence;
  - 2.3.9. The criteria applied by Review Boards when determining whether to release State Patients; and
  - 2.3.10. The recidivism rate among persons with mental or intellectual disabilities.
- 2.4. SALRC reports to the Minister of Justice and Constitutional Development and is therefore well positioned to request that the Minister coordinate with the Justice, Crime Prevention and Security Cluster, the Office of the Chief Justice, and other relevant portfolios, including the Minister of Health, to collect the necessary data.
  - 2.5. Formulating policy and recommending legislative reform in the absence of a clear understanding of the current realities within the criminal justice system risks producing reforms that are ineffective or unsustainable. While systemic challenges are noted in the discussion paper, these observations are not supported by empirical data derived from within the system itself.<sup>3</sup>
  - 2.6. In its current form, the discussion paper does not provide sufficient clarity regarding the realities on the ground or the specific systemic challenges requiring intervention. This makes it difficult to assess whether the proposed reforms would meaningfully improve the functioning of the system.
  - 2.7. Effective reform requires a clear understanding of both the nature and scale of the problems faced by the criminal justice system, which is impossible without accurate empirical data.
  - 2.8. The contribution of the psychiatrist involved in the development of the discussion paper is welcomed, particularly as the comments appear to reflect

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<sup>3</sup> See the systemic issues reference on page 25 in paragraph 2.39. Vague references to “experts in this area of the law” and “long periods awaiting trial” do not allow for a proper understanding of the extent of the problems faced by the system and how to turn the tide through reform.

extensive experience within the system. However, it raises the question of why the research process did not incorporate broader input from other role players.<sup>4</sup>

- 2.9. The proposals contained in the discussion paper, and ultimately in the final position paper of the SALRC, would carry greater weight if they were grounded in empirical evidence and informed by the experiences of practitioners working across the criminal justice system.
- 2.10. HSF therefore recommends that the SALRC utilise its mandate to call upon relevant stakeholders including the South African Police Service, prosecutors, the Office of the Chief Justice (in respect of court data), the Department of Correctional Services, and the Department of Health (including psychiatrists and mental health care facilities) to provide empirical data and practical feedback.
- 2.11. Such information would assist in constructing a comprehensive value chain describing the interaction of mentally and intellectually disabled accused persons, witnesses, and victims with the criminal justice system during the pre-trial, trial, and post-trial phases.

### **3. Lack of Victim Involvement in the Release of State Patients**

- 3.1. Having considered both Discussion Paper 169 and Discussion Paper 170 (dealing with the protection of the rights of victims of crime), it appears that neither adequately addresses the rights of victims of crimes committed by State Patients.
- 3.2. Although a State Patient is neither a remand detainee, nor convicted of a crime as they have been found unfit to stand trial and committed to a mental health care facility under section 77(6) of the Criminal Procedure Act, this does not negate the rights of the victims of those offences.
- 3.3. Discussion Paper 170 recognises that “the victim’s rights of participation in the parole and correctional supervision processes are crucial” during the post-trial phase.<sup>5</sup> However, victims of crimes committed by State Patients are not afforded similar opportunities to participate in post-trial decision-making processes.
- 3.4. These victims face several uncertainties, including uncertainty regarding the length of time a person may remain a State Patient.

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<sup>4</sup> Page 30 of the discussion paper.

<sup>5</sup> Page 57 of discussion paper 170.

- 3.5. This concern reflects the broader lack of reliable data highlighted above. Limited research exists in South Africa regarding the release of State Patients from mental health care institutions. One study relating to Sterkfontein Hospital suggests that approximately 69% of State Patients admitted for murder and rape had returned to the community within three years.<sup>6</sup>
- 3.6. This observation is not intended to advocate for indefinite detention but rather to highlight the need for clarity regarding the typical duration of admission and the factors considered when determining release.
- 3.7. The discussion paper references the Australian framework, in which limits on detention without conviction are linked to the sentence likely to have been imposed had the individual been convicted.<sup>7</sup>
- 3.8. Given the limited data currently available in South Africa, HSF does not make a definitive recommendation in this regard. However, HSF recommends that:
  - 3.8.1. comprehensive statistics regarding State Patient detention and release be collected;
  - 3.8.2. victims be provided with greater clarity regarding the anticipated duration of detention and the processes governing release; and
  - 3.8.3. victims be afforded the opportunity to make representations to the relevant decision-making bodies.

#### **4. Practical implications for victims and families**

- 4.1. In many instances the victim may be a member of the same family to which the State Patient will return upon release. Families therefore require adequate preparation and support to manage this eventuality.
- 4.2. South Africa's criminal justice system increasingly emphasises victim-centred approaches, as reflected in initiatives such as the Victims' Charter. However, victims of offences committed by State Patients are not afforded comparable opportunities for participation.

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<sup>6</sup> Forensic State Patients at Sterkfontein Hospital: A three-year follow-up study by B Marais and U Subramaney available at <https://sajp.org.za/index.php/sajp/article/view/708>.

<sup>7</sup> See page 37 at paragraph 2.75 of Discussion paper 169.

- 4.3. Within the parole system for convicted offenders, careful consideration is given to the suitability of the environment to which an offender will return. The parole process also provides structured opportunities for victims to participate in parole proceedings. Although victims' objections are not determinative, their participation can contribute to healing and closure for affected families through victim-offender mediation or participation in the process itself.
- 4.4. However, a similar assessment process does not appear to exist in relation to State Patients.
- 4.5. Section 45 of the Mental Health Care Act provides for "leave of absence from designated health establishments." This mechanism appears analogous to parole in that it allows temporary reintegration into the community while preparing the State Patient for eventual discharge under section 47 of the Act.
- 4.6. Failure to involve victims in these processes may pose risks to the State Patients themselves. Individuals released into communities where victims have not been prepared for their return may face hostility or vigilantism. Likewise, emotionally charged encounters with victims who have not had the opportunity to participate in restorative processes may hinder successful reintegration.
- 4.7. International examples may offer useful guidance. In Canada, Review Board hearings involve a broader range of stakeholders when determining whether State Patients should be released into the community, and victims may participate as attendees in those hearings.
- 4.8. In light of the above, HSF recommends that:
  - 4.8.1. Victims should therefore be afforded the opportunity to provide input during both leave-of-absence considerations and final discharge decisions, similarly to victim participation in parole proceedings; and
  - 4.8.2. That consideration of the home environment and the relationship between the State Patient and the victim form part of release considerations, in order to ensure that victims are not exposed to perpetrators and that State Patients do not experience potential violence or expulsion from communities.

## 5. Conclusion

- 5.1. The HSF supports the SALRC's initiative to review the legal framework governing mental and intellectual disability within the criminal justice system.
- 5.2. However, meaningful and sustainable reform requires a clear understanding of how the system currently operates in practice. The absence of reliable empirical data regarding the number of affected individuals, the availability of psychiatric resources, and the management of State Patients presents a significant obstacle to informed policy and legislative development.
- 5.3. HSF therefore submits that the SALRC should:
  - 5.3.1. Utilise its institutional mandate to facilitate the collection of comprehensive data from relevant stakeholders, including the South African Police Service, the National Prosecuting Authority, the Department of Correctional Services, the Department of Health, and the Office of the Chief Justice;
  - 5.3.2. Provide disaggregated data based on age, sex, location, and offence type; and
  - 5.3.3. Recommend that the reform process should more fully consider the rights and experiences of victims of crimes committed by individuals who are subsequently declared State Patients. A more inclusive framework one would promote fairness, transparency, and public confidence in the system.
- 5.4. Addressing these gaps would assist in developing a more coherent and evidence-based framework for managing mental and intellectual disability within the criminal justice system, while ensuring that the rights and dignity of both victims and accused persons are appropriately recognised.